IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-1756

WALTER B. LEBOWITZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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The decisions below are reported as: Lebowitz v. State, 313 So.2d 473 (3d D. C.A. 1975), cert. denied, 330 So.2d 19 (Fla. 1976, and are printed in the Appendix to the Petition for a Writ of Certiorari as Appendix A, at 1-12 and Appendix C, at 15, respectively.

QUESTION PRESENTED

The respondent respectfully rephrases the petitioner's "Question Involved" as follows:

WHETHER THERE EXISTS AN ADEQUATE STATE GROUND SUFFICIENT TO PRECLUDE THIS COURT'S REVIEW OF THE FEDERAL ISSUE?

STATEMENT OF THE CASE

The respondent accepts the petitioner's Statement of the Case as correct, but deems the following additional facts to be relevant to this Court's decision on the question of jurisdiction:

THE SEARCH

Sergeant Joseph Feria and Sergeant

Gordon Ridge, both of the Miami Beach Police Department, testified to the facts surrounding the execution of the warrant issued to search the petitioner's home for a particularly described purse. (R. 277-321) Sergeant Feria testified on direct that, on December 8, 1973, he, accompanied by four other policemen, went to the petitioner's home about 8:00 a.m. to execute the warrant. (R. 279-82) After the officers had identified themselves and their purpose to the petitioner, the witness read the search warrant in its entirety in the presence of the petitioner, his wife and the maid. (R. 284-85) They began the search in the dressing room off the bedroom on the right at the top of the stairs. (R. 285-88) While the petitioner sat on the bed in the bedroom, Feria heard Ridge announce in a loud voice that he had found the purse. (R. 289-90) Feria saw Ridge come out of the dressing room holding the purse. (R. 290-91) The following questions and answers were had:

> [By the prosecutor, Mr. Carhart]
>
> Q: After Sgt. Ridge came back with the pocketbook in his hand, what, if anything, did you do?
>
> [By Sgt. Feria]
>
> A: We placed Mr. Lebowitz under arrest at this time.
>
> Q: Who did that?
>
> A: Officer Napoliello.

> Q: In your presence?
>
> A: In my presence. And, he was read his rights by Officer Napoliello.
>
> Q: And what, if anything, transpired after that particular incident as far as you were concerned at that moment?
>
> A: We allowed Mr. Lebowitz to make a phone call, which he had requested.
>
> Q: Then what?
>
> A: And allowed him to get dressed. And then we proceeded to the station where he was booked.
>
> (R. 291)

The first testimony concerning the petitioner's failure to explain his possession of the purse was then elicited by the petitioner's counsel. On cross-examination, defense counsel asked Feria to explain any conversation that took place after he read the warrant to the petitioner. (R. 296) Feria stated that he had asked the petitioner if the upstairs bedroom was his, and petitioner had indicated that it was. (R. 296-97) Defense counsel asked Feria why he had not asked the petitioner where the purse was. Feria

replied: "In describing the pocketbook to him in the search warrant, he did not volunteer any information." (R. 297) Defense counsel also asked the witness other related questions about why Feria had not simply asked the petitioner to go get the purse. (R. 297-99)

Sergeant Ridge testified that he was the one who actually found the purse during the execution of the warrant. (R. 303-06) When he found the purse in the closet in the dressing room, he carried it out to the bedroom and held it up for Feria to see. (R. 307) Again, cross-examination by defense counsel brought out the fact that the petitioner had failed to explain his possession of the stolen purse. (R. 317-19) Defense counsel asked what conversation occurred after the warrant was read. Ridge could not recall. Ridge stated that he had not asked the petitioner if he had the described purse. (R. 319) Ridge was asked if anyone had asked the petitioner if he possessed the purse; the witness did not know. (R. 319-20) The following exchange took place:

> [By defense counsel, Mr. Carlton]
>
> Q: Why didn't you, sir, before going into the dressing room to make your job that much easier, say, Mr. Lebowitz, do you have, or does your wife

> have a purse such as that which I have described to you? Why didn't you do that, sir?
>
> [By Sgt. Ridge]
>
> A: He invited us to search.
>
> Q: Did you ask him anything about the purse?
>
> A: No, sir, I did not.
>
> (R. 320)

FOLEY AND SANKEY'S TESTIMONY

The witness George Foley, stated that the petitioner told Foley to steal the purse after being told that Foley couldn't get it with a bad check. (R. 458, 484, 503) But, the petitioner cautioned Foley not to let John Sankey steal it because petitioner did not trust Sankey. (R. 484)

Foley testified that Sankey actually stole the purse and carried it out of the store. (R. 399-400, 459) John Sankey corroborated that testimony. (R. 511-14)

Foley also testified that when he gave the stolen purse to the petitioner, the latter inquired as to whether Foley had had any trouble and asked if Foley had been observed. (R. 403)

John Sankey testified that Foley warned him not to tell the petitioner that Sankey had stolen the purse. (R. 547-48) Sankey related that Foley had told him that the petitioner knew the purse would be stolen and that the petitioner had told Foley to be sure that Sankey was not the one to steal it, because the petitioner did not trust Sankey. (R. 541)

PETITIONER'S TESTIMONY

The petitioner testified in his own behalf. (R. 732-915) He gave an explanation of his possession of the purse which had been stolen from the Neiman-Marcus Store several days prior to the search. He said George Foley gave it to him as a gift for the petitioner's wife. (R. 749) Foley had showed the petitioner the receipt several days prior to the day the purse had been delivered to him by Foley. (R. 748) The petitioner said that he did not ask Foley for the receipt because the purse was in a Neiman-Marcus box when delivered. (R. 750) The petitioner testified that when the police came to his home, they read the search warrant to him and told him to go sit in the bedroom. (R. 758) His <u>own counsel</u> asked the petitioner this question:

> Did any of the police officers who came to the house ask you if you had a purse such as this, and if so, would you go ahead and get it for him?
>
> (R. 758)

The petitioner replied:

> If any of them would have said "Do you have such a purse, and if so, would you please give it to me," I would have gone to get it.
>
> (R. 758)

When asked if he had told Foley or Sankey to steal the purse or to defraud Nieman-Marcus for the purse, the petitioner replied:

> Absolutely no. I wouldn't jeopardize my practice and my possessions for a silly $200 purse.
>
> (R. 759)

When asked if he had had any suspicions about whether the purse had been stolen, the petitioner stated:

> I didn't know, and I was absolutely not suspicious because I saw a receipt from Neiman-Marcus. It came in a box from Neiman-Marcus, and it was absolutely

> no reason in the world for me to think that this purse, or any other purse, was taken by any other means but by purchase through the normal course of commerce.
>
> (R. 759-60)

All of the foregoing testimony was on direct examination of the petitioner by his own counsel.

On cross-examination by the prosecutor, the petitioner testified that the policemen had read the search warrant to him and had told him to go to the bedroom. However, he admitted that they had not questioned him, had not placed him under arrest, had not pulled guns, and had not handcuffed him. (R. 869-70) Indeed, the petitioner admitted that, when he heard the purse described by the warrant, he knew what they were talking about. (R. 870) It was at that point in the testimony that the cross-examination was had about the petitioner's silence at the time the search warrant was executed. That cross-examination is set forth fully in the petition, at 6-8, and in the opinion below, Appendix, at 4-6. Absolutely no objection was ever raised at trial to the entire line of questioning.

The prosecutor asked no questions concerning statements, or lack thereof, by the petitioner after he was arrested and advised of his right to

remain silent. However, defense counsel did bring out, on re-direct questioning of the petitioner that, after being placed under arrest and being advised of his rights, the petitioner chose to avail himself of those rights "as every American is entitled to." (R. 903)

JURY ARGUMENT

When the defense counsel presented his opening argument to the jury at the close of all evidence, he stated:

> But, moving along. I questioned Sgt. Ridge. And, I wondered as I listened to Sgt. Ridge's testimony, why they didn't ask him for the purse. And the State, of course, conversely came back and said, why didn't you tell them you had it. But, you must realize, and I imagine in your own home with five or four or whatever it was police officers coming in and reading a form and coming up there like something out of a television movie, that there was not even an opportunity to tell them. Plus, the fact it makes absolutely--absolute sense, if they had said to him, do you have a purse such as we have just described in this search warrant. And if Mr. Lebowitz said to you, no, I

> don't have such a purse, that you would be hearing it in this Courtroom. However, neither Sgt. Ridge or Sgt. Feria or Ruth Shapiro, who testified from the store--Remember Mrs. Shapiro?
>
> (R. 1080-81)

The prosecutor responded to this statement with the argument, quoted in the petition, at 8. To this reference concerning the petitioner's silence at the time of the search, there was absolutely no objection raised by the defense counsel.

POST TRIAL

In his Motion for New Trial and/or Motion for Arrest of Judgment, petitioner asserted twenty-one grounds, none of which were directed to either the cross-examination on silence or the reference to such silence in the closing argument. On direct appeal, he assigned twenty-three judicial acts as error, but none of these were directed to the cross-examination and closing argument concerning petitioner's pre-arrest silence.

Finally, on October 1, 1974, just before filing his brief on his direct appeal, petitioner filed a Supplementary Assignment of Error in the court

below, directed to the cross-examination issue concerning the petitioner's silence and his failure to explain his possession of the recently-stolen property.

In his brief, that issue was raised and argued. However, no reference was made to the prosecutor's closing argument in reference to the testimony.

On petition for a writ of certiorari to the Supreme Court of Florida, the petitioner finally complained about the prosecutorial comment in his closing argument.

ARGUMENT

With regard to the cross-examination now claimed to amount to a violation of a federal right sufficient to warrant review by this Honorable Court, the court below clearly stated that, once the petitioner takes the stand in his own defense, he can be cross-examined about his silence at the time the search warrant was executed as a logical and common sense test of his credibility. (App. at 7-9) In that light, the issue might seem ripe for this Court to determine whether its decisions in Doyle v. Ohio, ___U.S.___, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and United States v. Hale, 422 U.S. 171 (1975) should be extended to embrace a

pre-arrest, pre-custodial situation where no interrogation took place.

However, when read in its full context, the decision of the District Court of Appeal of Florida, Third District, clearly rests upon two independent state grounds, adequate to support the holding, even if the above stated decision of the appellate court on the federal issue was incorrect.

A familiar principle which has been enunciated by this Court is that it will decline to review state court judgments which rest on independent and adequate state grounds, even where such judgments also decide federal questions. Henry v. State of Mississippi, 379 U.S. 443 (1965); Murdock v. The Mayor and Aldermen of Memphis, 20 Wall. 590 (1875). The policy behind this rule was clearly stated in Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citations omitted.] The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the

> state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. [Emphasis supplied.]

In Lynch v. New York, 293 U.S. 52, (1934), this Court explained:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal

> question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Thus it is clear that, unless the court below could not have affirmed the petitioner's conviction without deciding the federal question, this Court should decline to review the decision at bar. And, in determining the basis of the opinion below, this Court should look beyond the broad sweep of the language of the opinion and determine for itself precisely whether the judgment rests on state or federal grounds. Black v. Cutter Laboratories, 351 U.S. 292 (1956).

The respondent readily admits that the court below actually ruled on the federal issue here sought to be reviewed. However, in so ruling, the court relied heavily on two separate state grounds in support thereof. The first ground is procedural--the fact that no contemporaneous objection had been made in the trial court to the cross-examination of the petitioner about his silence during the execution of the search warrant. The second ground is substantive--the finding that the petitioner had "invited" exactly that

kind of cross-examination by his own testimony on direct examination. The respondent submits that either ground would be adequate to support the affirmance of the petitioner's conviction. Thus, even if this Court were to reverse the ruling below on the federal issue, the combination of the two state grounds makes it apparent that the state appellate court would render the same judgment upon remand, making any ruling by this Court merely advisory. Therefore, this Court should decline to review the instant judgment.

It is a well settled rule in Florida that only identified judicial acts can be assigned as error on appeal. Rule 3.5 c., F.A.R. (See App. A) And, it is necessary that the party seeking review must have made known to the trial court the judicial act desired or the objection to a judicial act, and the grounds in support thereof. Rule 6.7 g., F.A.R. (See App. B) Thus, it is clear that an appellate court in Florida must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made. State v. Barber, 301 So.2d 7 (Fla. 1974); O'Berry v. Wainwright, 300 So.2d 740 (Fla. 4th D.C.A. 1974).

In the instant case, the petitioner did not object to either the questions asked on cross-examination or the reference to such cross-examination

in the closing argument of the prosecutor. Having failed to secure a judicial ruling on either matter, he had no right to raise the issue for the first time on appeal.

With regard to prejudicial comments in the closing argument, the Florida courts have made it clear that the absence of a contemporaneous objection will preclude appellate review. Thomas v. State, 326 So.2d 413 (Fla. 1975); State v. Jones, 204 So.2d 515 (Fla. 1967); Rogers v. State, 30 So.2d 624 (Fla. 1947); Grimsley v. State, 304 So.2d 493 (Fla. 1st D.C.A. 1974); Britt v. State, 301 So.2d 151 (4th D.C.A. 1974), cert. denied, 312 So.2d 741 (Fla. 1975). Where a defendant is represented by competent counsel, the trial court is under no duty to declare a mistrial on its own motion because of improper comments by the prosecutor during closing argument. Alexander v. State, 326 So.2d 456 (Fla. 4th D.C.A. 1976); Morgan v. State, 303 So.2d 393 (Fla. 2d D.C.A. 1974). Where the prosecutor's comment was made in response to an argument by the defense counsel and no objection was raised in the trial court, the issue is certainly not reviewable on appeal. Kruglak v. State, 300 So.2d 315 (Fla. 3d D.C.A. 1974).

Federal law is consistent with the Florida law in ruling that, where no objection is made at trial to the prosecutor's comments, such

comments will not be the basis for reversal unless they are so highly inflammatory and prejudicial as to constitute fundamental, or plain error. United States v. Blakeley, 491 F.2d 120 (5th Cir. 1974); United States v. Washburn, 488 F.2d 139 (5th Cir. 1973); United States v. Jenkins, 442 F.2d 429 (5th Cir. 1971); United States v. Black, 480 F.2d 504 (6th Cir. 1973). This rule is particularly applicable where the questioned comment of the prosecutor is nothing more than "fair response" to defense counsel's own argument. United States v. Bursten, 453 F.2d 605 (5th Cir. 1971); Babb v. United States, 351 F.2d 863 (8th Cir. 1965).

In addition, the issue regarding the prosecutor's comment is not properly a question which this court should review since it was neither raised, briefed, nor argued in the state appellate court below, and no opinion thereon was rendered. Hill v. California, 401 U.S. 797 (1971); Monk v. New Jersey, 398 U. S. 71 (1970).

There was similarly no objection made in the trial court to the questions asked on cross-examination concerning the petitioner's silence at the time the search was conducted. The court below based its ruling in part upon that lack of a contemporaneous objection. (App., at 8) The ruling must be read as a finding that such questioning did not amount to plain error, since

this was the issue as framed by the petitioner in the state appellate court. (App., at 6) Thus it is clear that, under the circumstances of the case, the state appellate court did not view the federal issue as fundamental, as it had ruled in a previous case involving somewhat the same issue. Jones v. State, 200 So.2d 574 (Fla. 3d D.C.A. 1967); see Rule 6.16 a., F.A.R. (See App. B-C)

Under Florida law, the requirement for a contemporaneous objection in the trial court is necessary where no fundamental error has been committed. Rule 6.7 g., F.A.R. (See App. B) A mistrial should not be granted in such a situation unless the substantial rights of a defendant have been violated. The proper procedure where improper questions have been asked of a witness is to request the trial court to instruct the jury to disregard such objectionable remarks. Johnsen v. State, 332 So.2d 69 (Fla. 1976); Perry v. State, 146 Fla. 187, 200 So. 525 (1941). It is submitted that the questions asked by the prosecutor in the instant case were not so prejudicial that prompt curative instructions to the jury would not have been sufficient. However, no objection was made and no curative instructions were sought and denied. Therefore, the petitioner was in no position to assert such issue as error below. Rules 3.5 c. and 6.7 g., F.A.R. (See App., A-B)

The respondent is aware that this Court has held that the question of when and how defaults in compliance with state procedural rules can preclude this Court's consideration of a federal question is itself a federal question. Henry v. State of Mississippi, supra. However, if the state's insistence on compliance with its procedural rule serves a legitimate state interest, procedural default will serve to bar vindication of a federal right. Id.

The Florida rule requiring that an objection be raised clearly does serve such a legitimate state interest. In Clark v. State, ___ So.2d ___ (Case No. 74-889)(Fla. 2d D.C.A., Opinion filed July 28, 1976), Judge Grimes explicated the reasons for the rule:

> As part of our analysis, it may be helpful to consider what is meant by the terms 'fundamental error' and 'error of constitutional dimension.' Justice Adkins reminded us in Sanford v. Rubin, Fla. 1970, 237 So.2d 134, that 'fundamental error . . .is error which goes to the foundation of the case or goes to the merits of the cause of action.' See also Ashford v. State, Fla. 1973, 274 So.2d 517.

No objection need be made to preserve an attack on an error which is fundamental. Haley v. State, Fla.App.2d, 1975, 315 So. 2d 525. . . . In Ashford v. State, supra, the Supreme Court cautioned that appellate courts should exercise discretion under the fundamental error doctrine very guardedly.

Generally, fundamental errors are those of constitutional dimension. But not all errors of constitutional dimension are fundamental. This is illustrated by the fact that while one is protected by the Constitution from an illegal search and seizure, yet the illegality of a search and seizure may be waived by his failure to object to it. Robertson v. State, Fla. 1927, 114 So. 534; New v. State, Fla.App.2d, 1968, 211 So. 2d 35. Our Supreme Court has noted that constitutional issues other than those constituting fundamental error are waived unless they are timely raised. Sanford v. Rubin, supra. Thus, it seems fair to conclude that whether errors of constitutional dimension are fundamental depends upon their magnitude.

The desirability of having an objection voiced to evidence of the nature involved in this case is evident. As the Supreme Court observed in State v. Jones, supra, [204 So.2d 515], the rule which does not require an objection to be raised to the introduction of evidence of this type [testimony that an accused refused to make a statement to the police] 'made it possible for defense counsel to stand moot if he chose to do so, knowing that all the while a verdict against his client was thus tainted and could not stand. By such action defendants had nothing to lose and all to gain, for if the verdict be 'not guilty' it remained unassailable.' Likewise, to insist upon a blanket rule that no objection need be made can have the effect of placing the trial judge on the horns of a dilemma. Assuming questionable evidence has been introduced without objection, the judge may find himself in a position of declaring a mistrial which the defendant doesn't even want. If the judge is wrong (and often the determination of whether the evidence is improper is not so clear), the defendant may be entitled to release without a second trial on grounds of double jeopardy.

> Strawn v. State ex rel. Anderberg, Fla. 1976, 332 So.2d 601. Whether or not the judge could safely ask defense counsel to take a position with respect to whether he wanted a mistrial is not totally clear. Compare State v. Grayson, Fla. 1956, 90 So.2d 710, with Farmer v. State, supra [326 So.2d 32].
>
> [Emphasis supplied.]
> Slip opinion at 8-10.

That explanation of the Florida rule certainly supports the finding in the instant case that the issue did not present one of fundamental error, especially where there was no contemporaneous objection raised. See United States v. Ramirez, 441 F.2d 950 (5th Cir.), cert. denied, 404 U.S. 869 (1971).

The second state ground relied upon in support of the opinion below is substantive. Thus, the determination of the federal issue would not affect the disposition of the case on that ground. This Court has stated that it has no power to revise judgments on questions of state law which represent adequate non-federal grounds sufficient to preclude its review. Henry v. State of Mississippi, supra.

In the instant case, the court

below stated:

> . . . Also present in the instant case is a deeply rooted common law inference that guilty knowledge may be drawn from the fact of unexplained possession of stolen goods. See, Barnes v. United States, 412 U.S. 837, 37 L.Ed.2d 380, 93 S.Ct. 2357 (1973); State v. Young, Fla. 1968, 217 So. 2d 567.
>
> The appellant staunchly denied ever suggesting to Foley that he steal the purse, adding, 'I wouldn't jeopardize my practice and my possessions for a silly $200 purse.'
>
> In such a light, we think the state's cross-examination was a logical and common sense test of the appellant's credibility and one which the appellant certainly invited by his own testimony on direct examination. Indeed, we think that to have denied the state the right to point out the appellant's previous silence, in light of his elaborate version at trial of his transaction with Foley concerning the purse, would have been unfair to the state.
>
> [Emphasis supplied] (App., at 8-9)

It is widely accepted law in Florida that an appellant may not take advantage of an error which he has induced. Castle v. State, 305 So.2d 794 (4th D.C.A. 1974), aff'd, 330 So.2d 10 (Fla. 1976); Sullivan v. State, 303 So.2d 632 (Fla. 1974); McPhee v. State, 254 So.2d 406 (Fla. 1st D.C.A. 1971); Coral Gables v. Levison, 220 So.2d 430 (Fla. 3d D.C.A. 1969); Gagnon v. State, 212 So.2d 337 (Fla. 3d D.C.A. 1968); Arsenault v. Thomas, 104 So.2d 120 (Fla. 3d D.C.A. 1958). Federal law also acknowledges the validity of the doctrine of invited error. c.f. Mercer v. Theriot, 377 U.S. 152 (1964); United States v. Truitt, 440 F.2d 1070 (5th Cir. 1971).

The chronology of the trial testimony as set out in the Statement of the Case clearly indicates that the fact that the petitioner had remained silent during the search was initially brought out by defense counsel on cross-examination of the policemen. That fact was further emphasized on direct examination of the petitioner, himself, by his own counsel. It was revealed in such testimony that the police had asked the petitioner no questions, thus allowing the petitioner to assert that, had he been asked, he would have admitted to possessing the stolen item.

A strikingly similar situation occurred in the case of Tafero v. State, 223 So.2d 564 (Fla. 3d D.C.A. 1969). There, the court below ruled that the prosecutor's cross

examination of the appellant, to which no objection had been voiced, did not amount to fundamental error. Moreover, the court held that, by the previous questions which he had asked both the policeman and the appellant defense counsel had "opened the door" to the particular line of questioning by the prosecutor. Id.; c.f. Williams v. State, 238 So.2d 137 (Fla. 1st D.C.A. 1970); Kiraly v. State, 212 So.2d 311 (Fla. 3d D.C.A. 1968).

Such reasoning is supported by the following language of this Court in McGautha v. California, 402 U.S. 183, 215 (1971):

> It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. [Emphasis supplied.]
>
> c.f., Williams v. Florida, 399 U.S. 78 (1970).

In Doyle v. Ohio, supra, (96 S.Ct. at 2245, n. 11) this Court cited with approval the case of United States v. Fairchild, 505 F.2d 1378 (5th Cir. 1975). There, the federal court assumed that evidence of Fairchild's silence following his arrest should have been excluded from the evidence.

However, the court held that, by his own testimony on the question of his cooperation with the law enforcement authorities, Fairchild "opened the door" to a full, and not just a selective development of the subject. Id.

Such ruling comports with the decision below on that issue. In addition it should be noted that the Fifth Circuit also ruled that, while the prosecutor's comment on Fairchild's post-arrest silence should have been excluded and a corrective instruction should have been given, the trial court's failure to do so sua sponte was not plain error. The same kind of ruling on both issues would not change the final judgment in the instant case.

Therefore, while the court below did rule on the federal issue, it did not rest its judgment solely on such ground. Where the state judgment rests on two grounds, one of which involves a federal question and one of which involves an adequate state ground, the latter of which would be sufficient to sustain the judgment, and it is not clear upon which of the two grounds the judgment was based, this Court should refuse to consider the question. Lynch v. New York, supra.

Moreover, where there exists at least the strong possibility, in the light of state law, that the state appellate court rested its decision

upon a nonfederal ground, the petitioner has the burden of demonstrating that neither state ground enunciated can account for the decision below. c.f., Durley v. Mayo, 351 U.S. 277 (1956); Stembridge v. Georgia, 343 U.S. 541 (1952).

In the final analysis, the respondent submits that the defense offered by the petitioner (an experienced criminal lawyer) and his defense counsel represented an affirmative waiver of the federal right he now seeks to have vindicated. At trial, the petitioner and his counsel made the obviously conscious choice to use the fact that the police officers did not question him during the execution of the search warrant [the police thereby demonstrating admirable caution not to violate the spirit of this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966)]. Petitioner brought out such fact in order to explain why he had not previously asserted his lack of guilty knowledge. In so doing, he tried to convert the constitutional shield provided by Miranda into a sword against the state. However, by such affirmative testimony, the petitioner waived his right not to have his silence used against him. The nature of his testimony cried out for just the kind of cross-examination he received.

The fact that his planned defense backfired does not negate the existence of a deliberate waiver under

the circumstances of the case. See Henry v. State of Mississippi, supra. In fact, this Court's analysis in Johnson v. United States, 318 U.S. 189 (1943) appears to be particularly appropriate to the circumstances presented by this case:

> We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. The court only followed the course which he himself helped to chart and in which he acquiesced until the case was argued on appeal. The fact that the objection did not appear in the motion for new trial or in the assignments of error makes clear that the point now is a 'mere afterthought.'

Id., at 201.

CONCLUSION

Even though the District Court of Appeal of Florida, Third District, decided the federal issue here presented, the judgment rests upon both a procedural and a substantive state ground, which in combination are adequate to support the judgment even if the federal issue was decided incorrectly. Therefore, this Court should decline jurisdiction and deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT IN OPPOSITION was furnished by mail to the HONORABLE E. DAVID ROSEN, Attorney for Petitioner, 19 West Flagler Street, Miami, Florida 33130, this____day of September, 1976.

LINDA COLLINS HERTZ
Assistant Attorney General

APPENDIX

APPENDIX A

EXERPTS OF FLORIDA APPELLATE RULES

PART III. PROCEEDINGS GENERALLY

* * *

Rule 3.5. ASSIGNMENTS OF ERROR

. . .
. . .

c. Essentials. The assignments or cross assignments of error shall designate identified judicial acts which should be stated as they occurred; grounds for error need not be stated in the assignment.

* * *

PART VI. CRIMINAL APPEALS

Rule 6.1. APPLICABILITY OF PART VI

Appeals in criminal cases to the Supreme Court, the district courts of appeal and to the circuit courts (including appeals from municipal courts), shall be prosecuted in accordance with Part VI of these rules and, except as herein stated, with such provisions of other parts of these rules as are not inconsistent with the provisions of Part VI.

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APPENDIX B

Rule 6.7. ASSIGNMENTS OF ERROR AND DIRECTIONS TO CLERK

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g. Formal Exceptions Not Necessary in Order to Assign Error.

Formal exceptions to rulings, orders or charges of the court are not necessary to support the assignments or cross assignments of error provided for by these rules; but for all purposes for which an exception has ever been necessary, it is sufficient that a party, at the time that the ruling, order, or charge of the court is made, or sought, makes known to the court the action which he or it desires the court to take, or his or its objection to the action of the court and his or its grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him.

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Rule 6.16. SCOPE OF REVIEW

a. Generally. Upon an appeal by

either the state or the defendant the appellate court shall review all rulings and orders appearing in the appeal record insofar as it is necessary to do so in order to pass upon the grounds of appeal. The court shall also review all instructions to which an objection was made and which are alleged as a ground of appeal, and the sentence when there is an appeal therefrom. The court may also in its discretion, if it deems the interests of justice to require, review any other things said or done in the cause which appear in the appeal record, including instructions to the jury. The reception of evidence to which no objection was made shall not be construed to constitute a ruling by the court.

b. Sufficiency of Evidence. Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not.